

THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

PLAINTIFF'S MOTION FOR
RECONSIDERATION

NOTE FOR MOTION CALENDAR:

SEPTEMBER 9, 2010

I. RELIEF REQUESTED

Plaintiff requests the Court reconsider its Order Granting Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy.

II. BACKGROUND FACTS

On August 31, 2010, the Court entered an Order Granting Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy (the "order") and applied Washington's Anti-SLAPP Act to (1) dismiss Plaintiff's state law claims, (2) impose a \$10,000 penalty on Plaintiff, and (3) award the defendant its attorneys' fees and costs.¹

¹ See generally Order Granting Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy, filed on August 31, 2010, Dkt. #23.

III. LEGAL ARGUMENT

The Court should reconsider and vacate its order because the application of Washington's Anti-SLAPP Act ("the Act") was manifest error as it (1) unduly burdens Plaintiff's right of access to the courts, (2) violates the separation of powers, and (3) violates the Washington constitution. Fed. R. Civ. P. 7(h)(1).

A. ACCESS TO THE COURTS

Once a moving party brings a special motion to strike, Washington's Anti-SLAPP Act ("the Act") requires the responding party (always the plaintiff) to establish by clear and convincing evidence the probability of prevailing on his claims. *Id.* at § 2(4)(b). The statute, however, stays discovery and any motions upon the filing of the motion. *Id.* at § 2(5)(c).

The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). A plaintiff's right of access to the courts includes the right of extensive discovery in order to effectively pursue his claim and uncover evidence. *Id.*; *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). By requiring Plaintiff to submit evidence supporting his claims prior to the discovery process, the Court's order violates Plaintiff's right of access to courts and is manifest error. *Id.*

The Court's application of the Act also blocked Plaintiff's access to the courts by requiring him to present clear and convincing evidence he would likely prevail (while blocking discovery), rather than a preponderance of the evidence. *Doe v. Gonzaga University*, 143 Wn.2d 687, 706, 24 P.3d 390 (2001). By imposing that higher burden, the Court's order was manifest error.

1 **B. SEPARATION OF POWERS**

2 The Court's order is manifest error as it violates the separation of powers doctrine by
3 using the Act to improperly impose procedural rules that conflict with the Civil Rules. The
4 civil rules only require a "short and plain statement of the claim" and a demand for relief in
5 order to file a lawsuit. Fed. R. Civ. P. 8(a). Likewise, Fed. R. Civ. P. 11 circumscribes notice
6 pleading to the extent that it must be well grounded in fact and warranted by existing law.
7

8 The *Putman* court held that the statute requiring the plaintiffs to submit evidence
9 before they had an opportunity to conduct discovery conflicted with the civil rules regarding
10 notice pleading – one of the primary components of our justice system. *Id.* If a statute
11 conflicts with a court rule, the court rule will prevail in procedural matters and the statute will
12 prevail in substantive matters. *Id.* at 980. *Putman* held the statute was procedural rather than
13 substantive, as it addressed how to file a claim to enforce a right. *Id.* at 984-85. The statute
14 did not address the primary rights of either party, which were rooted in the common law, and
15 dealt only with the procedures to effectuate those rights. *Id.* at 982, 984-85. Therefore, as a
16 procedural law it could not prevail over conflicting court rules.²
17

18 The same constitutional improprieties are present here. The Act imposed procedural
19 requirements that conflict with FRCP 8 and FRCP 11 because it required Plaintiff to present
20 clear and convincing evidence he will prevail. It also overwrites FRCP 12 and FRCP 56,
21 which provide the standards the court must use to dismiss a claim, and it precludes use of the
22 discovery tools contained in Fed. R. Civ. P. 26-37.
23

24
25 ² The Washington Supreme Court recently reinforced *Putman* in *Waples v. Yi*, 169 Wn.2d 152, 158-62, 234 P.3d
26 187 (2010), where it held former RCW 7.70.100, which required ninety days notice of intent to file a malpractice
claim, was an unconstitutional violation of the separation of powers doctrine.

1 **C. VIOLATION OF ARTICLE II, SECTION 37 OF THE WASHINGTON**
 2 **CONSTITUTION**

3 The Washington Constitution is designed to protect the people. One of the ways it
 4 does this is to preclude “sleeper” provisions in legislation. That is exactly what occurred here.

5 Article II, section 37 provides that: “No act shall ever be revised or amended by mere
 6 reference to its title, but the act revised or the section amended shall be set forth at full
 7 length.” This section protects the legislature and public from fraud and deception, and avoids
 8 confusion, ambiguity and uncertainty. *State v. Tessema*, 139 Wn. App. 483, 488-89, 162 P.3d
 9 420 (2007). No other search should be required to determine which sections are amended,
 10 and a new statute must show how it amends others. *Washington Ass'n of Neighborhood*
 11 *Stores v. State*, 149 Wn.2d 359, 372-73, 70 P.3d 920 (2003).

13 SSB 6395, which became the Act, purported to amend RCW 4.24 by creating new
 14 sections and prescribing penalties. RCW 4.24.510 partly provides that a person who
 15 communicates certain information to the government is immune from civil liability for doing
 16 so. *Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707 (2004). The purpose is to
 17 protect such citizens by providing a defense for retaliatory lawsuits. *Valdez-Zontek v.*
 18 *Eastmont School Dist.*, 154 Wn. App. 147, 167, 225 P.3d 339 (2010).

20 SSB 6395 makes no mention of RCW 4.24.510 and does not set forth the text of that
 21 statute which it amended. Where RCW 4.24.510 provides immunity from civil liability to
 22 persons who communicate certain information to the government, the Act expands the
 23 definition of an action involving public participation giving it extraordinary sweep. No longer
 24 are communications with the government the subject of the legislation. Instead, it includes
 25 “[a]ny oral statement made, or written statement or other document submitted, in a place open
 26

1 to the public or a public forum in connection with an issue of public concern. *Id.* at (d). The
 2 legislation changed RCW 4.24.510 without setting forth how it did so, which violates article
 3 II, section 37, and the Court's order applying it was manifest error.
 4

5 **D. VIOLATION OF ARTICLE II, SECTION 19 PROHIBITING MORE THAN**
 6 **ONE SUBJECT**

7 SSB 6395 similarly violates the single-subject rule in article II, section 19 of the
 8 Washington Constitution, which provides that "[n]o bill shall embrace more than one subject,
 9 and that shall be expressed in the title. *Amalgamated Transit Union Local 587 v. State*, 142
 10 Wn.2d 183, 206, 11 P.3d 762 (2000). There are two distinct prohibitions in article II, section
 11 19: (1) no bill shall embrace more than one subject, to prevent pushing legislation through by
 12 attaching it to other legislation, and (2) no bill shall have a subject which is not expressed in
 13 its title, to notify members of the Legislature and the public of its subject matter. *Id.* at 207.
 14

15 SSB 6395 violates both requirements. First, SSB 6395 addressed more than one
 16 subject. While SSB 6395 purported to limit lawsuits involving petitioning government, it
 17 implicates lawsuits, like this one, that have nothing to do with petitioning government. By
 18 doing so, it inhibits such lawsuits through its draconian requirements. This affects two
 19 different types of lawsuits, and involves two different subjects, which violates article II,
 20 section 19. The Court's application of it to Plaintiff's claims is manifest error.
 21

22 Second, SSB 6395 encompasses something far beyond its title. The title of SSB 6395
 23 is "[a]n act relating to lawsuits aimed at chilling the valid exercise of the constitutional rights
 24 of speech *and* petition." [Emphasis added.] The title is in the conjunctive and states the right
 25 of petitioning government is what is covered by the Act. Section 4 states the act may be cited
 26 as the "Washington Act Limiting Strategic Lawsuits Against Public Participation."


1 But the Act involves lawsuits, like this one, that are not SLAPP lawsuits and have
 2 nothing to do with petitioning government. In enforcing the Act, the Court relied upon §
 3 (2)(d) that defines “an action involving public participation and petition” as “[a]ny oral
 4 statement made, or written statement or other document submitted in a place open to the
 5 public or a public forum in connection with an issue of public concern.” In other words, the
 6 Act involves petitioning government, but then defines petitioning government as something
 7 other than petitioning government. The Washington Constitution protects against such
 8 shenanigans. Article II, section 19 has been violated, and the Court’s order imposing the Act
 9 on Plaintiff’s claims is the result of manifest error and should be reversed.
 10
 11

12 VI. CONCLUSION

13 Plaintiff respectfully requests the Court reconsider and vacate its Order Granting
 14 Defendant’s Special Motion to Strike Plaintiff’s Claims of Misappropriation of Likeness and
 15 Invasion of Privacy because it is the result of manifest error.

16 RESPECTFULLY submitted this 9th day of September 2010.

17
 18 By:


 Thomas B. Vertetis, WSBA No. 29805
 Jason P. Amala, WSBA No. 37054

Pfau Cochran Vertetis Kosnoff PLLC
 911 Pacific Ave., Suite 200
 Tacoma, WA 98402
 Phone: 253-777-0799
 Fax: 253-627-0654
 thomas@pcvklaw.com
 jason@pcvklaw.com
 Attorneys for Plaintiff

THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

CERTIFICATE OF SERVICE

I, Jason Amala, hereby certify that on today's date, I caused to be filed electronically Plaintiff's Motion for Reconsideration with the court, using the CM/ECF system, which will send email notification of such filing to the below addresses, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

 X CM/ECF Notification via email service to: Bruce E. H. Johnson, at brucejohnson@dwt.com and Noelle Kvasnosky, at noellekvasnosky@dwt.com.

I declare under penalty of perjury under the laws of the United States of America, 28 U.S.C. ¶ 1746, that the foregoing is true and correct.

Dated this 9th day of September 2010 in Seattle, Washington.

By  _____
Jason Amala